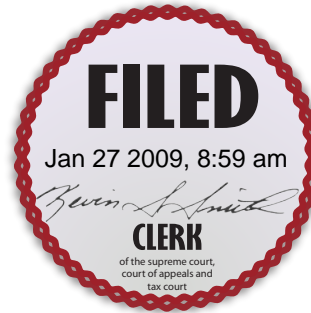


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

WILLIAM R. GROTH
GEOFFREY S. LOHMAN
Indianapolis, Indiana

ATTORNEY FOR APPELLEE:

MELINDA K. JACKMAN-HANLIN
Greencastle, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

SIMON FIRE EQUIPMENT & REPAIR, INC.,)

Appellant-Plaintiff,)

vs.)

TOWN OF CLOVERDALE, INDIANA,)

Appellee-Defendant.)

No. 67A04-0809-CV-544

APPEAL FROM THE PUTNAM CIRCUIT COURT
The Honorable Matthew L. Headley, Judge
Cause No. 67C01-0605-PL-178

JANUARY 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Simon Fire Equipment and Repair, Inc., appeals the trial court's judgment in favor of the Town of Cloverdale in Simon's breach of contract action against the Town. We affirm.

The sole issue for our review is whether the trial court erred in entering judgment in favor of the Town.

In April 2005, the Cloverdale Town Council solicited bids for a fire truck. One month later, Simon submitted an offer to sell the Town a 2001 truck for \$229,990.63. In June 2005, the Council conducted a special meeting to consider the bids. After discussing the financing, the Council passed a restated motion "to accept the bid of Simon for the 2001 demo truck . . . subject to favorable financing after sitting down with financial advisors and making sure that the Town is comfortable with the financial arrangements." *Simon Fire Equipment and Repair, Inc., v. Town of Cloverdale*, 873 N.E.2d 1140, 2007 WL 2702650 (Ind. Ct. App. 2007). The motion passed by a three-to-one vote, with one member abstaining. The Council notified Simon that it would accept its bid, subject to the favorable financing.

In May 2006, Simon filed a breach of contract action against the Town alleging that the Town had breached the contract for the sale of the fire truck by refusing to pay for it and accept its delivery. The Town filed a summary judgment motion, which the trial court granted. On appeal, this court found a contract between the parties had been formed, and "the Town [had] accepted [Simon's] bid with the conditions precedent of favorable or 'comfortable' financing." *Id.* at 4. However, given the record before us, we

could not say as a matter of law that the conditions precedent had been fulfilled. *Id.* Rather, because there appeared to be genuine issues of material fact as to whether the conditions were fulfilled or whether the Town made a reasonable good-faith effort to fulfill them, we reversed the grant of summary judgment in favor of the Town and remanded the case to the trial court. *Id.*

Following a bench trial, and pursuant to Simon's request that the court enter findings of fact and conclusions of law, the trial court entered the following findings and conclusions:

FINDINGS OF FACT

5. On June 8, 2005 the Council met in a special meeting to consider the bids that had been received from various vendors, including Simon, in response to the Town's advertisements for bids. In attendance at that meeting were Council President John Davis, and Members Judy Whitaker, Glen Vickroy, Dennis Padgett and Don Sublett.

6. At the June 8 meeting, Council member Judy Whitaker made a motion to "accept [Simon's] bid of \$229,990.63 subject to financial availability."

7. After member Sublett asked for an explanation as to the availability of financing, Whitaker mentioned that the Town's financial advisor, O.W. Krohn & Associates, was of the opinion that the Town should be secure in its approach to financing the purchase of the truck. Member Whitaker then restated her original motion "to accept the bid of Simon for the 2001 demo truck in the amount of \$229,990.63 subject to favorable financing after sitting down with financial advisors and making sure that the Town is comfortable with the financial arrangements."

8. Whitaker's motion passed by a three-to-one vote, with member Padgett opposed and member Vickroy abstaining. . . .

13. On July 19, 2005, the Council held another special meeting to discuss the financing of the purchase of the fire truck. At the meeting member Whitaker moved to approve the ordinance authorizing a bond issuance, but the motion failed by a vote of two to three. . . .

16. On August 18, 2005, Shirley Terrell, Area Specialist with the United States Department of Agriculture Rural Development's Bloomfield, Indiana office, sent the Council a letter to advise that Rural Development funds for the fire truck had been obligated as follows:

Loan - \$213,000 @ 4.1250% for 20 years
Grant \$37,650

20. Both Vickroy and Sublett in their respective trial testimony acknowledged that between the June 8 and July 19, 2005 special meetings, neither made any individual effort to investigate and determine whether there might be available financing that could be obtained under terms more favorable than that which had been offered by Rural Development. The issues for both men, especially Sublett, was not that 4.1250% was a "good" rate, but rather given the entire financial impact on the town's financial health due to the purchase of the truck. Sublett drew a diagram at trial explaining that he wasn't comfortable with the whole packet not the rate itself.

21. On December 13, 2005, the Council approved a motion by a vote of three to two to return the \$25,000.00 bid check to Simon, and that the check was thereafter returned to Simon, along with a letter dated December 20, 2005.

22. On April 7, 2007, Simon sold the fire truck to the city of North Bend, Oregon, for \$199,990.00.

23. Simon's president and CEO, Jim Simon, testified at trial that as a result of the Town's decision not to go forward with the purchase of the fire truck, he was forced to incur an additional \$4,500.00 in broker's commissions, \$1,666.39 in additional repairs and maintenance of the vehicle, and an additional \$24,328.63 in interest on the loan he had taken out on the truck during the period between the Town's decision to rescind its acceptance of Simon's offer to sell and Simon's sale of that vehicle to the city of North Bend, Oregon, and that his total damages (exclusive of pre-judgment interest) thus were \$60,585.65.

CONCLUSIONS OF LAW

1. After this Court granted summary judgment in favor of the Town of Cloverdale and against Simon, Simon appealed to the Indiana Court of Appeals. . . . the Court of Appeals did send the case back to the Trial Court to determine if the conditions precedent of “favorable financing” and the Town being “comfortable” with the financing were met. These were issues so tried. The Court of Appeals further held that the Town could not rely upon failure to obtain “favorable financing” or not being “comfortable” with the financing if the Town causes such failure, observing that “when a party retains control over whether a condition will be fulfilled, that party has an implied obligation to make a reasonable and good-faith effort to satisfy that condition.” *Id.* citing *AquaSource, Inc. v. Wind Dance Farm, Inc.*, 833 N.E.2d 535, 539 (Ind. Ct. App. 2005). . . .

3. The Court of Appeals directed the Trial Court to make factual findings of whether or not the condition precedent in that the town obtains “favorable financing” and be “comfortable” was met, were “among the issues” to be decided.

4. A party has an implied obligation to make a good-faith effort to satisfy a condition precedent; the absence of bad faith on its part does not relieve a party of making that effort. *Indiana State Highway Commission v. Curtis*, 704 N.E.2d 1015, 1019 (Ind. 1998). Here, it is not disputed that the town did pursue financing, it met with Krohn and Assoc., it met with the RDC and even met two at a time at members’ homes. . . .

6. If the town’s motion at issue is exclusively upon whether or not the financial package arranged was a favorable package, this Court would be obligated to rule that a contract was formed. However, a council is obligated to not look only at one piece of the town’s financial needs – it is required by law to view the overall health of the municipal corporation. The council realized that even though the rate was favorable, the entire financial soundness of the town would be potentially impaired by the length of time to pay back this purchase that the purchase would cause the town to have very little uncommitted money for several years. . . .

7. Causing the failure of a condition precedent means more than the mere rejection of the contract for sound reason or for newly discovered information. *Indiana State Highway Commission v. Curtis*, 704 N.E.2d

1015, 1019 (Ind. 1998). Here, the reason appears sound – once the town considered this project, other needed projects, (both foreseen and unforeseen), and the town’s financial commitment, it was not comfortable with the whole picture.

8. There is no evidence that the Town acted in bad faith.

9. Court finds for the Defendant.

Simon does not challenge the trial court’s findings. Rather, Simon’s sole contention is that the trial court’s findings do not support its conclusions. Specifically, Simon argues that the “decision not to buy the fire truck had nothing to do with the availability of favorable or comfortable financing; the Town merely decided not to buy the fire truck and rejected the available financing package.” Appellant’s Br. At 9-10.

Where the trial court enters findings of fact and conclusions of law pursuant to Indiana Trial Rule 52, the judgment will be reversed only if it is clearly erroneous. *Yeager v. McManama*, 874 N.E.2d 629, 641 (Ind. Ct. App. 2007). To determine whether the judgment is clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. *Id.* We will not reweigh the evidence or assess witness credibility. *Id.* A judgment is clearly erroneous if this court’s review of the evidence leaves us with a firm conviction that a mistake has been made. *Id.*

Our review of the evidence in this case leaves us with no such conviction. Specifically, Vickroy and Sublett both testified that even though the financial package was favorable, they were not comfortable with the financial impact of the truck purchase on the financial health of the Town. This evidence supports the trial court’s conclusion

that the Town was not comfortable with the financing. Because this condition precedent was not fulfilled, the trial court did not err in granting judgment in favor of the Town.

Affirmed.

BAKER, C.J., and MATHIAS, J., concur.